LEGAL EFFECT OF ATTEMPTS TO SEVER EASEMENTS FROM THE DOMINANT TENEMENTS. — That an easement cannot exist severed from its dominant tenement, is now well settled.[1] Consequently, when the owner attempts to grant the easement to a stranger, or to reserve it in a grant of the dominant tenement, the easement must either be extinguished or else remain still attached to the land.[2] But as to which of these results legally follows the attempted severance, there is curiously little authority. Some language in the old books,[3] together with a modern dictum,[4] points toward the extinguishment of the easement; while the alternative conclusion is supported by scattering dicta,[5] and a strong line of recent decisions in New York.[6] The latest of these has just been handed down. *Freund* v. *Biel*, 35 N. Y. L. J. 1567 (App. Div., July, 1906). The latter view seems preferable. Whether the attempt to sever the easement be by grant or reservation, there is lacking the intention requisite for an abandonment of it;[7] for the parties to the conveyance intend — as indeed in this latest New York case was expressly stated in the instrument — not to abandon the easement, but to keep it in existence though severed from the land. Furthermore, in spite of the common law hostility toward easements, there seems to be little justification for introducing a doctrine according to which the easement is extinguished by a transaction solely between the owner of the dominant tenement and a stranger, his grantee, to the certain detriment of one, and to the benefit of neither, but only of the servient tenement.

Admitted that the attempted severance leaves the easement unextinguished and still appurtenant, the further question arises, what rights, if any, accrue therefrom to the person in whose favor the attempt was made? The only answer of authority seems to lie in some of the New York decisions previously mentioned. In these cases the owners of land with easements appurtenant, which were infringed by elevated railroad structures, granted the dominant tenements, "reserving the easements" or "reserving all claim or rights of action" for future damages thereto. The grantees were held liable as trustees for the grantors of all moneys received for the invasion of the easements, although it was admitted that neither the easements nor the rights of action for the infringement of them could be held in trust.[8] The foundation for the trust was obtained by torturing the words of reservation into a contract to pay these sums as part of the purchase price of the land.[9] But this reasoning is wholly fictitious: the grantor's words of reservation do not and cannot impose upon the grantee the active duties of the contractual obligation. In reality, if any equity does flow to the grantor because of the words of reservation, it seems that its source must lie in a mutual mistake of law made in supposing that the easement itself could be reserved. If the

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1 Hall *v.* Lawrence, 2 R. I. 218, 243.

2 See Phillips *v.* Rhodes, 7 Met. (Mass.) 322, 324.

3 See 4 Vin. Abr. 594 (O).

4 See Cadwalader *v.* Bailey, 17 R. I. 495, 503.

5 See Moore *v.* Crose, 43 Ind. 30, 34.

6 Pappenheim *v.* Metropolitan, etc., Ry. Co., 128 N. Y. 436, 446; Kernochan *v.* N. Y., etc., R. R. Co., 128 *ibid.* 559, 568; Pegram *v.* N. Y., etc., R. R. Co., 147 *ibid.* 135; Foote *v.* Metropolitan, etc., Ry. Co., 147 *ibid.* 367; Shepard *v.* Manhattan Ry. Co., 169 *ibid.* 160; Western, etc., Co. *v.* Shepard, 169 *ibid.* 170; McKenna *v.* Brooklyn, etc., R. R. Co., 184 *ibid.* 391.

7 See Foote *v.* Metropolitan, etc., Ry. Co., *supra*.

8 Western, etc., Co. *v.* Shepard, *supra*; Freund *v.* Biel, *supra*. See also Pegram *v.* N. Y., etc., R. R. Co., *supra*; McKenna *v.* Brooklyn, etc., R. R. Co., *supra*.

9 See Western, etc., Co. *v.* Shepard, *supra*, 180.

parties had understood the legal effect of the words of the instrument in question, would any court have labored to raise the equity? If rescission for mutual mistake of law be allowable, the court of equity might well allow the grantee the option of indemnifying the grantor for the loss resulting from the mistake, by handing over the sums recovered for the infringement of the easement, — substantially the result attained by the New York courts. Although any suggestion of rescission for mutual mistake as to the legal effects of an instrument has been consistently repudiated in New York,[10] yet the recent decisions may indicate a tendency to apply the doctrine, at least in certain cases. With the application of this principle the results reached in these easement cases seem correct; without it there appears to be difficulty in discovering any basis for legal or equitable rights in these attempts to sever easements.

EJECTION OF A PASSENGER WHO PRESENTS A WRONG TRANSFER CHECK. — There is apparently a growing tendency on the part of the courts to hold that, where a passenger has been furnished with a wrong ticket, a conductor after hearing an explanation of the circumstances evicts the passenger at his peril on the latter's refusal to pay another fare. A late case so decides. *Georgia Ry. & Electric Co.* v. *Baker*, 54 S. E. Rep. 639 (Ga.). Not only are the authorities upon this point in serious conflict,[1] but often the reasoning of the same court in different cases is inconsistent. It is of course well settled that if a passenger who is rightfully on a car with a proper ticket is evicted through the conductor's mistake as to the sufficiency of the ticket, such ejection is a tort, and the company is liable.[2] Even when a wrong transfer is given, some courts seem to proceed upon the theory that the passenger is rightfully on the second car, since the journey is considered continuous, irrespective of the necessity for a change of cars. Such a view is, however, inconsistent with the facts of the case. A railroad is not under obligation in return for the payment of a fare to carry a passenger to his ultimate destination, but to carry him to the transfer point, and to furnish him with a ticket which shall entitle him to take another car at that point.[3] In issuing a transfer, therefore, the first conductor is in no different situation from the agent who sells a ticket in the station.

When a station agent makes a mistake in issuing a ticket, some courts, though holding that ordinarily the railroad is not liable in tort for a subsequent eviction, make a distinction if the invalidity of the ticket would not be apparent to the holder upon a reasonable examination, and under such circumstances permit a recovery for the eviction.[4] The basis for this distinction is apparently founded on some idea of contributory negligence on the part of the passenger. Other courts adopt reasoning which leads to exactly the opposite result, and hold that the eviction is lawful, except where

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[10] See Arthur *v.* Arthur, 10 Barb. (N. Y.) 1; Curtis *v.* Albee, 167 N. Y. 360, 364; also Western, etc., Co. *v.* Shepard, *supra*, 180.

[1] Indianapolis St. Ry. Co. *v.* Wilson, 161 Ind. 153; Cleveland City Ry. Co. *v.* Conner, 78 N. E. Rep. 376 (Oh.). *Contra*, Norton *v.* Consolidated Ry. Co., 63 Atl. Rep. 1087 (Conn.); Little Rock Ry. & Electric Co. *v.* Goerner, 95 S. W. Rep. 1007 (Ark.).

[2] See 9 HARV. L. REV. 221.

[3] Norton *v.* Consolidated Ry. Co., *supra*.

[4] Murdock *v.* Boston & Albany R. R. Co., 137 Mass. 293. *Cf.* Bradshaw *v.* South Boston R. R. Co., 135 Mass. 407.